



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GROVER SELLERS
ATTORNEY GENERAL

Honorable W. K. McClain
District Attorney
Georgetown, Texas

Dear Sir:

Opinion No. 0-6855

Re: Authority of a city marshal
to serve a capias pro fine
in a case in the justice
court which was filed by him

Your letter requesting an opinion on the above subject
matter is as follows:

"A few days ago, H. A. Hodges, County Auditor,
of Williamson County wrote you a letter asking for
an opinion. In answer to that letter your Assistant
Mr. W. C. Cason, on September 21st, 1945, answered
the same by sending him a number of opinions which
your department had rendered. None of these opinions
would answer directly the question asked in his
first paragraph, or first question that he asked.
That question that he asked was:

"Does a City Marshal have legal authority
to serve a Capias Pro Fine in a case in the
Justice Court which was filed by him."

"The defendant was not present when the case
was tried; and defendant consented that it be tried
in his absence. Therefore Art. 788 of the Code of
Criminal Procedure it seems would control. That
article is as follows:

"When a pecuniary fine has been adjudged
against a defendant not present, a capias
shall forthwith be issued for his arrest.
THE SHERIFF SHALL execute the same by placing
the defendant in jail."

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"Our statute directs that the Sheriff shall execute the same; and not some other peace officer or city marshal. I therefore doubt if we can read into the statute the word constable or 'other Peace Officer' as contended by Mr. Hodges. Please advise us on the above question, and I will appreciate the same."

Article 441, V. A. C. C. P., defines a *capias* as "a writ issued by the court or clerk, and directed 'To any Sheriff of the State of Texas' commanding him to arrest a person accused of an offense and bring him before that court forthwith, or on a day or at a term stated in the writ."

Article 453, V. A. C. C. P., states that a *capias* may be executed by any constable or other peace officer. Article 36, V. A. C. C. P., states that city marshals are peace officers.

Article 918, V. A. C. C. P., which is found in Title 11 concerning procedure in the justice and corporation courts, states, "If the defendant be not in custody when judgment is rendered, or if he escapes from custody, thereafter, a *capias* shall issue for his arrest and confinement in jail until he is legally discharged."

In the case of *Ex parte Fernandez*, 57 S. W. (2d) 578, the Court of Criminal Appeals held that Article 920, C. C. P., applied to a case of conviction in the justice court rather than Article 793, V. A. C. C. P., for the reason that Article 920 had reference to judgments of conviction in criminal actions before a justice of the peace while Article 793 had reference to judgments of conviction in criminal actions in courts of higher jurisdiction. The court used the following language, on page 579:

"The chapter in which article 920, *supra*, appears is one having reference to a judgment of conviction in a criminal action before a justice of the peace. From what has been said it is apparent that the statutory enactments make a distinction on the subject in hand with reference to the conviction of a misdemeanor before the justice of the peace and the conviction of a misdemeanor in courts of higher jurisdiction. . . ."

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Following the reasoning of the above quoted case, it is our opinion that Article 918, supra, would apply to a capias issued by the justice court rather than Article 788, V.A.C.C.P.

A capias pro fine has been defined as a writ running in behalf and for the benefit of a governmental agency, "for collection of fine and means literally, you take for the fine." See Words and Phrases, Vol. 6, page 60. Therefore, a capias pro fine is in reality a special type of warrant of arrest.

One of the requisites for a warrant issued by the justice of the peace as set out by Article 885, V. A. C. C. P., is that, "It shall be directed to the proper sheriff, constable or some other person named therein." Therefore, it is our opinion that the justice of the peace may, if he desires to do so, issue the capias pro fine in the name of "The State of Texas", and direct it to the city marshal.

If the justice of the peace directs the capias to the city marshal, such city marshal would be authorized to serve it. However, the justice of the peace is not required to direct the capias to the city marshal if he does not see fit to do so, but he may direct the capias to "the proper sheriff, constable or some other person named therein" as provided by Article 885, supra.

Yours very truly,

ATTORNEY GENERAL OF TEXAS

By

J. C. Davis, Jr.
J. C. Davis, Jr.
Assistant

John Reeves

APPROVED OCT 23 1945

ATTORNEY GENERAL OF TEXAS

JR:ddt:LJ

